# Exhibit A

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| ADVENTIST HEALTH SYSTEM SUNBELT HEALTHCARE CORP.,<br><br>Plaintiff,<br><br>v.<br><br>MULTIPLAN, INC.,<br><br>Defendant. | Civil Action No. 1:23-CV-07031-ER-KP |

**BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO DEFENDANT MULTIPLAN, INC.'S MOTION TO DISMISS**

## INTEREST OF AMICUS CURIAE

The American Hospital Association (AHA) represents nearly 5,000 hospitals, health care systems, and other health care organizations. Its members are committed to improving the health of the communities that they serve, and to helping ensure that care is available to and affordable for all Americans. The AHA educates its members on health care issues and advocates on their behalf, so that the perspectives of hospitals and health systems, along with the patients they serve, are considered in formulating health policy. One way in which the AHA promotes its members' interests is by participating as amicus curiae in cases with important and far-ranging consequences.

The AHA's member hospitals have a significant interest in this case. Commercial insurance reimbursements comprise the majority of most hospitals' revenue. Moreover, because government programs like Medicare do not cover the costs of providing care, commercial reimbursements can be the difference between losing money, breaking even, or earning a sustainable margin.[1] The AHA's member hospitals thus depend on competition among commercial payors to ensure that commercial reimbursement rates are sufficient to cover hospitals' costs and preserve patient access to care throughout the United States.

## INTRODUCTION

This lawsuit comes at a crucial time for the health care sector. Since the onset of COVID-19, the prices for key inputs—including labor, prescription drugs, and medical equipment—have grown dramatically. America's hospitals and health systems have borne the lion's share of these increased costs. Government reimbursements were inadequate before the

[1] *See* Am. Hosp. Ass'n, *The Financial Stability of America's Hospitals and Health Systems Is at Risk as the Costs of Caring Continue to Rise* at 1 (Apr. 2023) (hereinafter "2023 Cost of Caring Report"), *available at* https://www.aha.org/costsofcaring.

pandemic, and have since fallen even further behind. In December, for example, the Medicare Payment Advisory Commission noted in a preliminary presentation to Commissioners that hospital Medicare margins had sunk to an all-time low of *negative 12 percent*.[2] Reimbursements from commercial payors have likewise failed to keep pace with hospitals' increased costs. The result is dire: nearly half of all U.S. hospitals have negative operating margins, bond defaults are up, and hundreds of rural hospitals are on the brink of collapse.

The situation is much different for the commercial insurance companies that use MultiPlan's repricing tool. Commercial payors like United Healthcare are some of the largest and most profitable companies in the world. They generate hundreds of billions of dollars in revenue each year; they earn healthy margins; and their sizeable profits generate equally sizable shareholder returns. In 2020, while hospitals were devastated by the COVID-19 outbreak, insurers banked record profits. Several years later, this economic divergence between providers and payors is the new normal. Hospitals and health systems continue to struggle financially, while insurer share prices continue to grow.

Against this backdrop, it is imperative that courts hold commercial insurers to the same standards as everyone else. The AHA respectfully submits this *amicus* brief to offer a broader perspective on what is really at stake here. This is not merely a dispute between MultiPlan and a health system it describes as "one of the largest hospital systems in the United States." MultiPlan Br., Dkt. No. 65, at 1. And the "financial plight of rural hospitals" that MultiPlan dismisses as mere "speculation," *id.* at 33 n.7, is anything but. If, as Adventist alleges, MultiPlan

[2] Alison Binkowski et al., Medicare Payment Advisory Committee, *Assessing payment adequacy and updating payments: Hospital inpatient and outpatient services* at 14 (Dec. 7, 2023), *available at* https://www.medpac.gov/wp-content/uploads/2023/03/Hospital-Dec-2023-SEC.pdf.

has facilitated collusion among commercial insurers throughout the country, this Court's intervention will help preserve the viability of many struggling hospitals that cannot survive without competitive reimbursements.

## ARGUMENT

### I. America's hospitals and health systems face an unprecedented economic crisis.

America's hospitals and health systems are in trouble. After suffering record losses in 2020, many hospitals have struggled to break even due to the combination of (i) continually rising costs, and (ii) insufficient reimbursements from government payors. Now, more than ever, hospitals need competition between commercial payors to generate enough revenue to cover their costs and remain viable for the long term.

Though many hospitals struggled before COVID-19, the pandemic triggered a nationwide financial crisis for hospitals and health systems. During the early stages of the pandemic, America's hospitals provided lifesaving care to millions as most of the country remained in lockdown. Yet at the same time, hospitals incurred devastating financial losses.[3]

Even though the worst of COVID-19 is now behind us, hospitals still feel the economic effects of this one-in-a-century pandemic. Expenses have continued to rise across the board, with substantial increases in the cost of labor, medication, medical supplies and equipment, and purchased services. These cost increases have dwarfed the relatively modest increases in hospital prices and government reimbursements during this same time period.

With respect to labor costs, the COVID-19 pandemic led to critical workforce shortages

[3] Robert King, Fierce Healthcare, *Hospitals close out 2020 with declining margins and higher expenses due to COVID-19* (Jan. 26, 2021), *available at* https://www.fiercehealthcare.com/hospitals/kaufman-hall-hospitals-close-out-2020-declining-margins-and-higher-expenses-due-to-covid.

in 2020 and 2021, requiring hospitals to incur greater costs to hire and retain workers.[4] Yet in 2022, things somehow got worse—just as emergency funding from Congress began to dry up. Due to a combination of sustained COVID-19 surges, an outbreak of respiratory syncytial virus (RSV), and deferred care from the early days of the pandemic, demand for hospital care grew dramatically. To meet this demand, hospitals were forced to work with health care staffing agencies to fill necessary gaps, including for bedside nursing.[5] Staffing agencies capitalized on the situation and increased their rates to record levels.[6] As a result, hospitals' total labor expense in 2022 was 21% higher than in 2019, driven in large part by a staggering *258% increase* in contract labor expense.[7]

Drug expenses also increased dramatically. As hospitals and health systems struggled to overcome pandemic surges and workforce shortages, the prices they paid for numerous medications went up.[8] According to HHS, the prices of 1,216 drugs—including some used to treat chronic conditions like cancer and rheumatoid arthritis—increased by an average of 31.6%, roughly four times the rate of inflation.[9] Overall, average drug expenses per patient increased nearly 20% between 2019 and 2022.[10]

As labor and drug costs rose, hospitals and health systems also were forced to pay materially higher prices for medical supplies and equipment. Supply chain disruptions led to

---

[4] *See* 2023 Cost of Caring Report.

[5] *Id.* at 2.

[6] *Id.* at 2-3.

[7] Syntellis & Am. Hosp. Ass'n, *Hospital Vitals: Financial and Operational Trends* at 2 (Feb. 2023), *available at* https://www.syntellis.com/sites/default/files/2023-03/AHA%20Q2_Feb%202023.pdf.

[8] 2023 Cost of Caring Report at 3-4.

[9] *Id.* at 4.

[10] *Id.*

higher manufacturing, packaging, and shipping costs, which in turn led to higher prices for hospitals.[11] Between 2019 and 2022, laboratory expenses per patient increased by 27.1%, and expenses for emergency services—including ventilators, respirators, and other life-saving equipment—increased by nearly 31.9%.[12] At the same time, increases in patient acuity resulted in longer hospital stays and more intensive care, leading to even higher medical supply and equipment costs. Overall supply expenses per patient increased 18.5% between 2019 and 2022, nearly matching the increases in labor and drug costs.[13]

As hospitals and health systems faced significant price increases at every turn, their revenues did not keep pace. Even before the pandemic, reimbursements from government payors were insufficient to cover costs.[14] A 2016 analysis by the Congressional Budget Office concluded that, due in part to projected cuts to Medicare reimbursements, as many as 40-60% of hospitals would have negative profit margins by 2025.[15] But during the pandemic, government reimbursements fell even further behind. In 2020, Medicare paid only 84 cents for every dollar hospitals spent caring for Medicare patients, imposing tens of billions of dollars in losses on

[11] *Id.* at 5.

[12] *Id.* at 6.

[13] *Id.* at 5.

[14] Medicare Payment Advisory Committee, *Report to the Congress: Medicare Payment Policy* at xv (Mar. 15, 2019) (finding that hospitals' aggregate Medicare margin in 2017 was negative 9.9 percent and projecting a decline to negative 11 percent by 2019), *available at* https://www.medpac.gov/wp-content/uploads/import_data/scrape_files/docs/default-source/reports/mar19_medpac_entirereport_sec_rev.pdf.

[15] Congressional Budget Office, Working Paper Series, *Projecting Hospitals' Profit Margins Under Several Illustrative Scenarios* at 2 (Sept. 2016), *available at* https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/51919-Hospital-Margins_WP.pdf.

hospitals nationwide.[16] All in, while total hospital expenses increased by 17.5% between 2019 and 2022, Medicare reimbursements for inpatient care increased by only 7.5%.[17] Hospitals were unable to make up for this shortfall through increased commercial reimbursements. In 2022, for example, growth in general inflation (8%) was more than double the growth in hospital prices as measured by the Bureau of Labor Statistics (2.8%).[18]

Unsurprisingly, rapid increases in cost coupled with modest increases in revenue have taken a severe toll on hospitals' financial performance. Eighteen rural hospitals closed in 2020 alone.[19] Over half of U.S. hospitals ended 2022 operating at a loss.[20] This trend continued into 2023: according to one study, the first quarter of 2023 had the highest number of bond defaults by hospitals in over a decade;[21] according to another analysis, the median operating margin was negative in early 2023 and hovering around 1% through the end of November.[22]

---

[16] Am. Hospital Ass'n, *Fact Sheet: Underpayment by Medicare and Medicaid* (Feb. 2022), *available at* https://www.aha.org/fact-sheets/2020-01-07-fact-sheet-underpayment-medicare-and-medicaid. In 2020 alone, hospitals lost over *$100 billion* caring for Medicare and Medicaid patients combined. *Id.*

[17] 2023 Cost of Caring Report at 1.

[18] *Id. at* 2; Micah Hartman et al., HealthAffairs, *National Health Care Spending in 2022: Growth Similar to Prepandemic Rates* at 2 (Jan. 2024) (citing BLS statistics for 2.8% growth in hospital producer pricing index), *available at* https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2023.01360. BLS statistics account for both government and commercial reimbursements. U.S. Bureau of Labor Statistics Industry Factsheet, *Producer Price Indexes*, *available at* https://www.bls.gov/ppi/factsheets/producer-price-index-healthcare-factsheet.htm (last visited Jan. 9, 2024).

[19] UNC, The Cecil G. Sheps Center for Health Services Research, *Rural Hospital Closures*, *available at* https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/.

[20] 2023 Cost of Caring Report at 2.

[21] *Id.*

[22] Kaufman Hall, *National Hospital Flash Report* at 7 (Nov. 2023) (showing negative median operating margins in January and February 2023 and a median operating margin just above 1% for November), *available at* https://www.kaufmanhall.com/insights/research-report/national-hospital-flash-report-november-2023.

## II. Commercial health insurers continue to generate sizeable profits.

As America's hospitals struggle to break even, the large commercial health insurers that use MultiPlan are more profitable than ever. COVID-19, it turns out, was a financial boon to the commercial health insurance industry. The deferred health care that decimated hospital financial health had precisely the opposite effect on commercial payors. Because many patients cancelled or delayed non-emergency medical procedures, the pandemic resulted in "one of the lowest medical loss ratios (83.5%) in decades."[23] These record-low medical loss ratios led to "outsized underwriting profits (more than US$40 billion) in 2020."[24]

Although medical loss ratios increased in more recent years, underwriting margins remained positive and generally consistent with pre-COVID levels.[25] The result is that large commercial insurers continue to generate sizeable profits even as cost increases plague hospitals and health systems. United Healthcare, for example, earned over $25 billion in additional revenue and increased its operating margin in 2022.[26] Then, to start 2023, it increased its first quarter revenues by 13% year-over-year, contributing to the additional $12 billion its parent company, UnitedHealth Group (UHG), earned *in that single quarter* compared to the same

---

[23] Andy Davis et al., *In a shifting market, it is "advantage" Medicare for health plans*, Deloitte Insights (July 25, 2023), *available at* https://www2.deloitte.com/us/en/insights/industry/health-care/health-insurance-trends.html. An insurer's medical loss ratio is its share of total premiums spent on medical claims.

[24] *Id.*

[25] *Id.* (noting that average underwriting margins from 2020-2022 were 2.8%, compared to 3.2% from 2017-2019).

[26] Press Release, UnitedHealth Group, UnitedHealth Group Reports 2022 Results, at 3 (Jan. 13, 2023), *available at* https://www.unitedhealthgroup.com/content/dam/UHG/PDF/investors/2022/UNH-Q4-2022-Release.pdf.

period in 2022.[27] UHG's share price more than doubled between the beginning of the pandemic and the date this lawsuit was filed.[28] The same is true for Elevance, the nation's largest Blue Cross/Blue Shield licensee.[29]

That commercial payors are profitable does not mean they are colluding, of course. But the Court should be skeptical of MultiPlan's effort to paint commercial insurers as victims of "supracompetitive price[s]" by Adventist or other healthcare providers. *E.g.*, Br. at 34. Such rhetoric is not just a distraction from the allegations in and merits of this case—it is out of step with the economic reality of the healthcare industry.

## III. Rural hospitals are uniquely at risk.

As MultiPlan notes in the first sentence of its brief, Adventist is a large health system with dozens of facilities across several states. It is in the miniscule minority of hospitals that have the wherewithal to pursue litigation of this nature. Most hospitals and health systems do

---

[27] Press Release, UnitedHealth Group, UnitedHealth Group Reports First Quarter 2023 Results, at 2-3 (Apr. 14, 2023), *available at* https://www.unitedhealthgroup.com/content/dam/UHG/PDF/investors/2023/UNH-Q1-2023-Release.pdf.

[28] https://finance.yahoo.com/quote/UNH/history/.

[29] https://finance.yahoo.com/quote/ELV/history/. Formerly known as Anthem, Elevance's net income increased from $4.6 billion in 2020 to $6.1 billion in 2021, while its stock price has grown by over $200/share over the past five years (a nearly 90% increase), more than doubling since March 2020. *See* Anthem Annual Report 2021, Financials (last visited Jan. 9, 2024), *available at* https://www.elevancehealth.com/annual-report/2021/financials.html (noting increase in shareholders' net income); https://finance.yahoo.com/quote/ELV/history/. Some other commercial payors with significant increases in share price since March 2020 include Cigna Group (91% increase from March 16, 2020, to the date of this lawsuit), Molina Healthcare (158% increase during same period), Humana Inc. (83% increase during same period), and CVS Health Corp., parent of Aetna (43% increase during same period). *See* https://finance.yahoo.com/quote/CI/history/ (Cigna); https://finance.yahoo.com/quote/MOH/history/ (Molina); https://finance.yahoo.com/quote/HUM/history/ (Humana); https://finance.yahoo.com/quote/CVS/history/ (CVS/Aetna).

not. Because this lawsuit addresses alleged conduct that harms (or could harm) many U.S. hospitals, regardless of size or ownership structure, it is important that the Court evaluate Adventist's allegations with an understanding of the bigger picture.

As discussed above, the past few years have been a challenging period for the health care sector. After the devastating losses of 2020 and three years of cost inflation, the median operating margin across all U.S. hospitals now hovers barely above breakeven. This means *nearly half of all hospitals* are still failing to cover their costs of treating patients.[30]

The situation is even more dire in rural communities. In January 2023, U.S. News and World Report reported on a study estimating that "[m]ore than 200 rural hospitals are at *immediate risk of closure* because they aren't making enough money to cover the rising cost of providing care, and their low financial reserves leave them little margin for error."[31] The same study found that another 400 rural hospitals "are at risk of closing in the near future."[32] The article notes that payments "particularly from commercial insurance plans" have failed to keep up with cost increases.[33] These insufficient payments are even more problematic for rural

[30] Lukas K. Gaffney & Kenneth A. Michelson, *Analysis of Hospital Operating Margins and Provision of Safety Net Services*, National Library of Medicine (Apr. 18, 2023) (defining hospital operating margin as "net income from patient care (operating revenue minus operating expenses) divided by revenue from patient care"), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10114034/.

[31] Dennis Thompson, U.S. News and World Report, *Hundreds of Hospitals Could Close Across Rural America* (Jan. 16, 2023), *available at* https://www.usnews.com/news/health-news/articles/2023-01-16/hundreds-of-hospitals-could-close-across-rural-america (emphasis added).

[32] *Id.*

[33] *Id.*

hospitals: relative to urban hospitals, rural hospitals serve less populated areas and are therefore "less likely to see enough patients on average to cover costs."[34]

America's rural and community hospitals need competitive reimbursements from commercial payors to carry out their core mission of providing care for their patients and communities. It is a matter of survival. Accordingly, the Court should not be distracted by MultiPlan's efforts to cast Adventist as some 800-pound gorilla seeking to "obtain a ***supracompetitive*** price for services billed on an [out-of-network] basis." Br. at 34 (emphasis in original). Instead, the Court should evaluate this case on the merits, with an understanding that the resolution of Adventist's claims will have a profound impact on hospitals and health systems throughout the country.

## CONCLUSION

Competitive reimbursement rates are critical to many hospitals and health systems. At this stage in the case, the AHA need not take a position on the merits of the underlying suit. But if, as Adventist alleges, commercial payors are colluding to fix out-of-network reimbursements, the Court should put an end to such conduct. In so doing, the Court will help alleviate the tremendous financial strain on America's hospitals and health systems, while preserving patient access to care in hundreds of communities across the United States.

[34] *Id.*

Dated: January 9, 2024

Respectfully Submitted,

*/s/ Aaron M. Healey*
Aaron M. Healey
**JONES DAY**
250 Vesey Street
New York, NY 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
ahealey@jonesday.com

*Counsel for Amicus Curiae The American Hospital Association*